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United States

OCTOBER TERM, 1993

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual; and KATHRYN L. HINKLE, an individual; on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JESSE BROWN, Secretary for Veteran's Affairs; THE DEPARTMENT OF VETERAN'S AFFAIRS; THE UNITED STATES OF AMERICA; and JANET RENO, Attorney General of the United States,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Swords to Plowshares Veterans' Rights Organization ("Swords") is a small, non-profit veterans service organization located in San Francisco, California.[1] Swords has been officially accredited and recognized by the Veterans Administration ("VA") as a service organization. Swords has been handling VA disability claims since 1974. Typically, Swords assigns a staff attorney and/or paralegal to each claim. In 1992 Swords provided claims advice and representation to about 250 veterans and their families. In addition, Swords has provided counseling, employment, and other services to veterans; runs a veterans' outreach program; and coordinates and provides services to homeless veterans.[2] Swords charges neither fees nor costs for the work it performs to serve the veteran population.

SUMMARY OF ARGUMENT

Swords has a keen interest in the constitutional issues raised by Petitioners. Swords views the *NARS* case as a veterans' civil rights case. Swords believes that the elimination of the $10 fee limitation is essential if veterans are to obtain meaningful access to our system of justice. In particular, the fee limitation, and the slightly less onerous fee restrictions found in the Veterans' Judicial Review Act of 1988, deprive veterans of any meaningful opportunity to present their claims for veterans' benefits. The effects of the fee limitation are most pernicious with respect to complex SCDD claims like ionizing radiation, dioxin, and post-traumatic stress disorder claims.

Swords also believes that the notion that the $10 fee limitation can be justified by the paternalistic goal of preventing over-

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[1] Swords has received written consents from the parties to this action for its filing of an amicus brief; these consents are filed herewith.

[2] Swords was a plaintiff in the original *NARS* case when it was filed on May 13, 1983, but dropped out as a plaintiff when the complaint was amended in 1986 to assert claims on behalf of a class of ionizing radiation claimants.

reaching by unscrupulous lawyers is antiquated and inherently flawed. It is especially ironic that our nation's veterans are singled out for this disparate treatment while no other group or individual in our country is deprived of access to retained counsel. Indeed, indigent suspects in criminal cases are provided counsel at government expense. If veterans and other citizens are to maintain confidence in our system for the administration of justice, they must be convinced that the government's procedures are fair. Artificial barriers such as the $10 fee limitation prevent access to adjudication mechanisms and significantly undermine public confidence in our system of justice. Likewise, the threadbare rationale which the Ninth Circuit relied upon to justify the fee limitation only serves to cause veterans to question the integrity of judicial processes.

For these reasons, and those expressed below, Swords joins with Petitioners and other amici in urging the Supreme Court to accept certiorari in this case. Swords joins in the brief filed by Petitioners, but also wishes to highlight several issues for the Court.

ARGUMENT

I. LACK OF AVAILABILITY OF COUNSEL AND OTHER REPRESENTATION TO HANDLE IR CLAIMS

Although Swords is committed to providing free representation to the disabled veteran population, Swords has adopted a policy *not* to handle Ionizing Radiation ("IR") Claims, principally because Swords lacks the resources and expertise to retain the medical and scientific experts that are necessary to evaluate and prosecute IR Claims and appeals. Although we do not currently accept radiation claims, other service organizations routinely call us for a referral to an attorney when they receive an IR Claim. Based on our long experience in Northern California and familiarity with veterans' service organizations, we can say with confidence that the other service organizations located here, like the American Legion, are not pursuing IR Claims past the most superficial initial filings. Whatever the policy of the national service

organizations, their local service representatives, as a practical matter, lack the resources to handle IR Claims.

In our view, no veterans' service organizations in Northern California currently provide competent representation to veterans with IR Claims. Without attorney participation, there can be no process, let alone due process, for IR Claimants. The simple fact confronted by every IR Claimant is that access to an attorney is the only avenue open for the meaningful assertion of their rights. IR Claims are complex, because they involve a mix of legal theories rooted in several iterations of legislation, more or less conforming regulations from the VA, and more detailed provisions in VA manuals, circulars, and other authorities. The case law is rapidly changing. Even the best-prepared service representative is poorly equipped to utilize statutes and case law, or fashion arguments with the skill of an attorney. Indeed, as a rule, the veterans' service representatives neither read cases nor are trained to interpret them. They cannot "shepardize," prepare declarations, or handle expert witnesses. To deny veterans the right to an attorney is to deny them access to the skills required to win cases such as *Walls*, discussed below.

The complexity of an IR Claim makes it extremely costly to pursue. A skillfully fought IR Claim will absorb many hundreds of hours of personnel time for a service organization. The lay service officers, however, have extremely heavy case loads, which prevent them from devoting more than a few hours to each claim. In addition to time demands, the necessity for expert testimony, in most cases, would require the service organization to make a considerable out-of-pocket expenditure for expert services, an expenditure which is rarely authorized because of budgetary constraints.

By law, moreover, veterans' service organizations may not charge fees for the work they do on behalf of their clients. If they win a very large retroactive award in an IR Claim, the service organizations receives nothing. The extraordinary amount of work and the expenses in prosecuting an IR Claim are powerful disincentives for veterans' groups to take these cases: for the cost of a

single IR Claim, many other more garden-variety veterans' claims could be worked. From the perspective of a service organization, the concentration of scarce resources on a single complex IR Claim is irrational, because it limits service to many other veterans. Indeed, this is the reason why service organizations rarely take these cases, and why at least one other service organization—the American Legion—refuses to accept IR Claims. *See* Pl. Tr. Ex. 225.

In our experience, it is essential that a veteran have access to an attorney if she or he is to have a realistic prospect of prevailing in an IR Claim. This conclusion is reinforced by statistics showing that IR Claimants who are represented by attorneys are 24 times as likely to prevail as those who are not. Handling an IR Claim is a complex and costly process. A capable advocate must have a command of all the intricacies of evidence, discovery, and legal writing. Case outcomes often turn on the skillful employment of scientific and medical experts disputing arcane radioepidemiological issues. Attorneys, by their training, are equipped with the skills needed for effective advocacy in this difficult arena.

By contrast, the service officers provided by veterans' service organizations (e.g., the American Legion, Veterans of Foreign Wars, and Swords to Plowshares itself) are poorly equipped with the legal skills that are at a premium in complex cases. Attorneys are needed to meet the sophisticated defense that the VA ordinarily mounts in these high-stake claims with important political implications.

II. PROCEDURAL AND SUBSTANTIVE DIFFICULTIES INHERENT IN IR CLAIMS

The body of law governing IR Claims is complex. Prior to 1984, VA regulations generally applicable to SCDD required proof of service connection. Obviously, it was extremely difficult for claimants to prove causation between an IR exposure forty years ago and a current cancer. In 1984, Congress passed the Veterans Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984). The preamble to

this act expressly recognized that IR Claims present issues far more difficult than the average disability claim. Therefore, this act established that the VA should provide entitlement based on statistical associations between IR exposure and disease.

Pursuant to Public Law 98-542, two regulations now largely determine the outcome of IR Claims. 38 C.F.R. 3.311b(b)(2) contains a list of approved IR diseases that may be service-connected if the VA makes the factual finding that the service-connected exposure is at least as likely as not to have caused the diseases. Testimony establishing a reconstructed radiation dose is an obvious obstacle to success for this route. The other regulation, 38 C.F.R. 3.309(d), provides a different list of presumptively-covered diseases and a different standard of proof. Entitlement to compensation for an illness specified on this list is predicated on a factual finding that the veteran's listed condition is also coupled with a "radiation risk activity."

III. *WALLS v. BROWN*: A CASE OF MISSED OPPORTUNITIES ILLUSTRATES THE VALUE OF ATTORNEYS

A recent Court of Veterans Appeals ("CVA") case illustrates the value of attorney representation in IR Claims. In *Walls v. Brown*, 5 Vet. App. 45 (1993), the Court of Veterans Appeals faced the issue of the evidence necessary to establish "radiation risk activity." Mr. Walls died of an infection caused by lymphoma, which is a "malignant disorder" under 38 U.S.C. sec. 1112. The disease could be service-connected under 38 C.F.R. 3.309, if the veteran had engaged in "radiation risk activity." The court determined that the VA had a plausible basis for concluding that there was no radiation risk activity.

Mr. Walls was a truck driver in a unit stationed near Hiroshima immediately after the war. His wife reported that he had told her that he had driven a truck to Hiroshima for supplies. Unfortunately, Mr. Walls's military records, which would almost certainly have indicated the veteran's duty assignments, had been destroyed in a fire at the National Personnel Records Center in

1973. Lacking the service records, the VA asked the Defense Nuclear Agency to confirm the veteran's duty station. The Agency could confirm only that Mr. Walls's unit was based 35 miles from Hiroshima. Under the test in 38 C.F.R. 3.309(d)(4)(vi), Mr. Walls would need to have been within 10 miles of Hiroshima, on at least one occasion, in order to meet the "radiation risk activity" requirement. Since the unit was located 35 miles away, the VA determined that the radiation risk test was not met—and the court upheld the VA's ruling.

Mrs. Walls lost her appeal for widows' benefits. She was represented by a non-attorney practitioner with Disabled American Veterans (DAV) in Washington, D.C. Had the Walls case been handled by an attorney from the beginning, the factual development likely would have been more intensive. (Mrs. Walls apparently did not seek the DAV's help until years after her husband's death.) An attorney would almost certainly have secured a detailed declaration from Mr. Walls, before his death, covering every aspect of his military service. It also would be normal practice for an attorney to interview other members of his unit, and to use the FOIA to secure military records showing what the unit did and where it traveled. Many other avenues to uncover helpful facts could have been pursued by an attorney.

The DAV's brief also suggested a missed opportunity—Mrs. Walls might have been entitled under an alternative legal theory. The court noted that Mr. Walls was diagnosed with colon cancer—which is a radiogenic disease recognized under 38 C.F.R. 3.311b. Since the colon cancer was not listed as an official cause of death, and as Mrs. Walls's advocate failed to mention this theory until the appeal, the court reasoned that the VA had no duty to pursue the colon cancer as an IR Claim, because it was not "reasonably raised" by the record. *Walls*, 5 Vet. App. at 49–50.

An attorney, however, likely would have spotted this issue and researched the colon cancer claim. If medical facts or expert testimony could be found to tie the colon cancer to the cause of death, then the IR Claim could be established under section 3.311b. Alternatively, if the cancer began in the colon and metas-

tasized to another site, causing death, the colon cancer could be classified as a contributory cause of death, establishing service connection under 38 C.F.R. 3.311b(b)(2). These important issues were totally missed by the advocate representing the claimant until raised—too late—by the DAV advocate in his Court of Veterans Appeals Brief.

IV. THE FORUM PROVIDED BY THE COURT OF VETERANS APPEALS IS INADEQUATE TO ADDRESS THE NEEDS OF IR CLAIMANTS BECAUSE PAID ATTORNEY PARTICIPATION IS PROHIBITED UNTIL THERE IS A FINAL DECISION BY THE BOARD OF VETERANS APPEALS

Another issue implied by the *Walls* holding is the limited nature of the forum provided to IR Claimants by the Court of Veterans Appeals. The CVA does not currently provide an adequate forum for IR Claims. The CVA experience under the less restrictive VJRA regime illustrates the more severe problems endemic in the $10 fee limitation. Thus, the effective advocacy depends on eliminating the $10 fee limitation for the *NARS* class, which is not covered by the VJRA. Accordingly, the *NARS* class does not even have the benefits of the VJRA.

Paid attorney representation before the CVA is not permitted until there has been a "final decision" by the Board of Veterans Appeals. 38 U.S.C. sec. 7266, 38 U.S.C. sec. 5904. A practical and important consequence of the "final decision" rule is that it prohibits that attorney from shaping the record on which the court will base its decision. The CVA's jurisdiction is limited to a review of the record created before the agency. 38 U.S.C. sec. 7252(b). The agency record is complete when the "final decision" is rendered, and this is the point at which a paid attorney can first intervene. Hence, the attorney is not permitted to correct or supplement the record before the court.

In contrast, the VA is free to rely on its attorneys for advice at any level of the IR Claim process. If the VA needs attorney advice

on an IR Claim, it can draw advice either from the VA attorneys who work for the general counsel's office or from the attorneys at the Board of Veterans Appeals. Only the veteran is denied attorney access during the claim process.

Had Mr. and Mrs. Walls been able to hire an attorney at the beginning of the claim process, they might have obtained a different result. They would undoubtedly have entered the CVA forum with a well-documented record, complete with expert diagnosis supporting the colon cancer issue and declarations from Mr. Walls and his fellow veterans supporting his contention that he visited Hiroshima.

Mrs. Walls's experience, though not unusual, highlights the due process travesty that all IR Claimants confront when challenging a VA ruling. They are laymen challenging a complex and professionally-organized government bureaucracy. The record of medical and legal evidence is almost entirely shaped by the VA. Only overworked and under-financed laypersons from the service organizations are permitted to represent the veteran until it is too late to affect the record upon which the CVA will rule. Only then, when the entire record of the medical evidence has been determined, is the veteran permitted to retain a lawyer for the CVA appeal.

But the right to a lawyer—under the constraints imposed by the CVA legislation—and the availability of lawyers are separate matters. Few lawyers have been attracted to CVA work—the restrictions are too onerous. Thus, 75% of the claimants at the Court of Veterans Appeals are *pro se*. The Swords staff attorneys know of only one private attorney in California who regularly practices before the Court of Veterans Appeals.

IR Claims are preeminently factual battles over medical judgments, dose estimates, exposure levels, and weapon yields. None of these factual issues can be raised at the CVA unless the veteran can meet the difficult test of proving that the VA's determination was "clearly erroneous." The CVA is an inadequate forum for IR appeals.

CONCLUSION

The $10 fee limitation, which continues to apply to thousands of VA claims, notwithstanding its repeal, prevents attorneys from intervening when they can do the most good for the client and the least harm to the VA. By acting early, attorneys can discourage clients with poor cases from pursuing a long and expensive crusade through the VA appeals process. Attorneys can help clients with good cases organize their evidence for effective presentation to the VA for early entitlement. Considerations of efficiency, constitutional due process, and simple fairness demand that veterans have the same rights to counsel as any other civil litigants in the United States of America.

Respectfully submitted,

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